

Ruppert



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Van Ben Industries, Inc.

File: B-234875

Date: July 17, 1989

DIGEST

Where standard language in solicitation's hazardous material provisions clearly obligates contractor to prepare material data safety sheets as part of contract performance if the materials to be delivered are listed in specified regulations as hazardous, and materials under solicitation are in fact listed, bidder's incorrect certification that the materials are not hazardous does not require rejection of bid.

DECISION

Van Ben Industries, Inc. (VBI), protests the award of a contract to Wisconsin Pharmacal Company (WPC), under invitation for bids (IFB) No. DLA120-89-B-0383, issued by the Defense Personnel Support Center for 511,600 iodine water purification tablets. VBI primarily contends that WPC's bid is nonresponsive and should have been rejected, and that WPC is not a responsible bidder.

We deny the protest.

Page 17 of the IFB contained standard clause 52.223-I001, Material Safety Data Sheets (MSDS), which states that if the materials to be delivered under the contract are hazardous, as defined in the latest edition of Federal Standard 313 and 29 C.F.R. 1910.1200, the contractor shall prepare and submit an MSDS as specified in standard clause 52.223-3, Hazardous Material Identification and Material Safety Data. Paragraph (c) of clause 52.223-I001 requires bidders to complete the following certification: "The offeror certifies that the material to be delivered () is or () is not hazardous as defined in the latest edition of Fed. Std. 313 and 29 CFR 1910.1200."

Two bids, from VBI and WPC, were received and were found to be equal in price and all other material respects. The contracting officer thus proceeded to make award based on a

046120/139233

drawing by lot, in accordance with Federal Acquisition Regulation (FAR) § 14.407-6(b). On March 16, 1989, a drawing was held, with WPC winning the drawing. The agency has withheld award pending our decision.

VBI contends that WPC's bid was nonresponsive, and should have been rejected, because WPC incorrectly certified under paragraph (c) that the water purification tablets are not hazardous items and therefore did not evidence an intent to provide an MSDS as required. VBI concludes that its bid, as the only responsive one received, should have been accepted for award. We disagree.

In general, to be responsive, a bid must be an unequivocal offer to perform without exception the exact thing called for in the solicitation so that upon acceptance the contractor will be bound to perform in accordance with all of the invitation's material terms and conditions. See Spectrum Communications, B-220805, Jan. 15, 1986, 86-1 CPD ¶ 49.

Paragraph (a) of clause 52.223-1001 states in pertinent part as follows:

"(1) If material to be delivered is hazardous as defined in the latest edition of Fed-Std-313 and 29 C.F.R. 1910.1200, the Contractor shall prepare and submit an MSDS as specified in Clause 52.223-3, Hazardous Material Identification and Material Safety Data."

The latest edition of Federal Standard 313 indicates that iodine is hazardous (as is undisputed here); thus, under subparagraph (a)(1), the contractor is obligated to prepare and submit an MSDS as part of its performance of the contract. This obligation is imposed on the contractor without reference to whether the contractor has certified under paragraph (c) that the material is hazardous, and a bid is responsive to the requirement, in our view, by virtue of the bidder's signing the bid without taking express exception to the requirement.

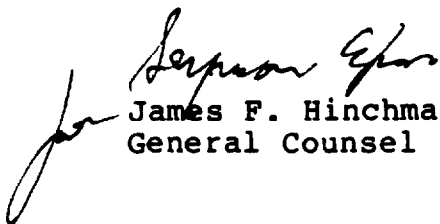
We do not agree with VBI that the incorrect certification under paragraph (c) somehow diminished WPC's obligation. There is no language in the certification to suggest that the bidder is agreeing to perform in a certain manner by completing it, and since subparagraph (a)(1) makes it clear that the contractor is obligated to furnish an MSDS where, as here, the material is listed as hazardous, the certification has no bearing on a bidder's agreement to perform. Rather, it appears the certification in paragraph (c) was

purely informational in nature; the certification is included in the clause as a means of aiding contracting officials in determining whether items are hazardous, a purpose unrelated to whether a bidder has obligated itself to perform as required. Certifications and representations that have no bearing on whether the bid constitutes an unequivocal offer to provide the product or service do not affect a bid's responsiveness. See generally R & R Roofing and Sheet Metal, Inc., B-220424, Nov. 21, 1985, 85-2 CPD ¶ 587; Automatics Ltd., B-214997, Nov. 15, 1984, 84-2 CPD ¶ 535.

VBI contends that the two firms' bids were not identical, and that the award based on tie bid procedures thus was improper, since WPC will incur costs in preparing MSDS that the firm obviously did provide for in its bid. However, whether or not WPC included this cost in calculating its bid, as stated above, WPC's bid obligated the firm to perform all the work in the IFB, including preparation of the MSDS, at its bid price. This being the case, since WPC's bid price on its face was the same as VBI's, the agency properly invoked the tie bid procedures in selecting the awardee.

Finally, VBI argues that WPC's failure to complete the certification properly evidences that firm's lack of understanding of the requirement and its inability to perform the contract satisfactorily, i.e., its nonresponsibility. The agency has determined otherwise, however, and WPC's responsibility is a matter within the agency's discretion that we will not question under the circumstances here. Chaulk Ambulance Service, B-228278, Jan. 7, 1988, 88-1 CPD ¶ 11.

The protest is denied.


James F. Hinchman
General Counsel